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IN THE

Supreme Court of the United States

October Term, 1968.

No. 498.

NEWARK STEREOTYPERS' UNION NO. 18,
Petitioner,

v.

NEWARK MORNING LEDGER CO. and NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit (4A-13A) is not yet reported. The opinion of the United States District Court for the District of New Jersey (15A-27A) is reported at 261 F. Supp. 832.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 18, 1968 (14A). The Petition for a Writ of Certiorari was filed on September 10, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the petitioning union can complain that it was deprived of its witness in an arbitration proceeding when it appears that, after a temporary refusal to testify, the witness was willing to continue his testimony and petitioner refused to continue questioning him.

2. Whether an arbitration panel was guilty of misconduct under Section 10(c) of the United States Arbitration Act because it limited the hearing before it to evidence bearing on the arbitrable issue and deferred a hearing upon a charge of witness intimidation to the district court proceeding available under the statute.

3. Whether, in a hearing on motion to vacate an arbitration award under Section 10(c) of the Arbitration Act, a charge of witness intimidation during the arbitration proceeding creates a duty in the district court to order a further hearing where the party making the charge was advised nine months earlier by both district court and arbitrator of its right to subpoena witnesses and take depositions and that party took no steps to obtain any evidence in support of its charge but, rather, simply renewed the charge on the basis of affidavits filed by its attorneys.

STATUTE INVOLVED.

Section 10 of the United States Arbitration Act, 61 Stat. 669, 9 U. S. C. § 10, provides in pertinent part:

> "In either of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> "(a) Where the award was procured by corruption, fraud, or undue means.
>
> • • • •
>
> "(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."

STATEMENT OF THE CASE.

A. The Nature of the Dispute and the Award.

In connection with the construction of its new newspaper plant, designed to take maximum advantage of fully automatic machinery, the Newark Morning Ledger Co., respondent herein, installed the M. A. N. stereotype plate-casting machine, intended for operation by one man.[1] Different types of competitive stereotype plate-casting machines, such as the Wood Supermatic, are operated by two men, and older types of machines by as many as four men.

Petitioner, Newark Stereotypers' Union No. 18, contended that the M. A. M. machine must be manned by more than one man as in the case of other stereotype plate-casting machines and, to resolve this dispute, an arbitration hearing took place. The arbitration panel consisted of two representatives of petitioner, two representatives of respondent, and a chairman appointed by the district court on petition of the parties (5a-6a, 150a).[2] The collective bargaining agreement in effect between petitioner and respondent empowered this panel to "* * * interpret any

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1. The short name applied to the machine is derived from the name of the manufacturer, the Machinen-Fabriken, Augsburg, Nuremberg, Germany.

2. The letter "A" will be used herein to refer to the appendix to the petition for certiorari. The designation "a" and "c" are used to refer to petitioner's appendices as filed in the court below and certified to this Court. The designation "b" is used to refer to respondent's appendices as filed in the court below and certified to this Court.

Respondent's "Statement" will rest principally on respondent's appendices since those appendices set forth fully the necessary excerpts from the proceeding before the arbitration panel. The appendices filed by petitioner consist mainly of affidavits by its attorneys which, while quoting some of the testimony before the arbitration panel, consist, in large measure, of accusations and conclusions by the affiants.

of the terms or conditions of this contract * * *" and provided, further, that all "* * * majority decisions of the [panel] shall be final and binding upon both parties * * *" (149a-150a).

Hearings before the arbitration panel began on January 4, 1966 and were concluded on February 18, 1966 (97a). This extensive hearing resulted in a transcript of 3,467 pages and the introduction of over 100 exhibits (97a). Following the completion of the hearing, briefs were submitted to the arbitration panel by the parties April 14, 1966 and, on June 30, 1966, the arbitration panel issued its 31 page decision and award (7a-39a).

On review of the full record, the arbitration panel rejected petitioner's contention that the new M. A. N. machine must be manned by more than one man as is the case with competitive stereotype plate-casting machines manufactured by the Wood Newspaper Machinery Corporation. To the contrary, the panel concluded (25a, 29a-31a):

> "Safety and efficiency in one-man operation of this fully-automated M. A. N. plate-casting and finishing machine has been put beyond question by almost a decade of experience in the United States. * * *"
>
> * * *
>
> "As observed supra, the one-man operation of the latest model of the M. A. N. machine has had unquestioned success throughout the United States. It is a fully automated one-man mechanical contrivance, tried and proved by operative experience (3291, 3292). And there has been one-man operation of older models of the M. A. N. in the United States (3321); in Louisville (1501), Portland (3292), Oklahoma City (2206, 2233, 2234, 2235), Birmingham (2005 et seq.), Syracuse (2179, 2180), Orlando (3292), and Los Angeles (2206).

"An acknowledged expert on the design and function of the M. A. N. machine, Carl Ringe, demonstrated its fitness to serve the Star-Ledger's needs (2733), the latest model embodying the new use of an old casting principle for manufacturing stereotype plates, the only machine having the feature known as automatic die casting (2749, 2751-2, 2753, 2754). The uniqueness is in casting under pressure in a totally closed mold (2753, 2754). The new features of the M. A. N. produce a plate of higher body density, homogeneously solid, without pores and holes that weaken the strength of the plate (2752, 2753, et seq.). The result is that the M. A. N. plates have a higher resistance against breaking than the conventional Wood machines. A test by the witness, Ringe, proved that the M. A. N. plates are 'dead solid,' whereas the Wood plates are full of holes (2755).

"And there was corroborating evidence by three experienced foremen who are also experienced operators. They found safety and efficiency in the operation of four M. A. N.s in Birmingham, Oklahoma City and Syracuse. In those three cities alone, 49 different stereotypers, all Union members (18 men in Birmingham) (2001), 18 men in Oklahoma City (2209), and 13 men in Syracuse (2179), have operated their M. A. N. machines alone for 4½ years in Birmingham (2005), 5 years in Oklahoma City (2202), and a year in Syracuse (2168); and in all those years involving all those one-man operations, there was but one injury, to the finger of George Davis (2565-2568), a minor bruise that kept him from his work one hour for first-aid treatment.

"The 'most experienced' stereotype operator of the M. A. N., Bobby J. Hardy of Oklahoma City, who

had operated four M. A. N. machines alone, advised the Oklahoma City management that such one-man operation was sufficient, and the operation and production results of the one-man operation were such that the reassured Oklahoma management five years later purchased a second M. A. N. which has likewise had one-man operation (2203-4; 2233-4; 2234-5)."[3]

B. The Challenge to the Award.

Petitioner moved to vacate the award on the basis of Section 10 of the United States Arbitration Act, 9 U. S. C. § 10, *supra*, p. 2, contending that, first, the arbitration panel was guilty of misconduct in refusing to hear evidence material to the controversy and that, second, the award was procured by corruption, fraud and undue means (40a-41a). The challenge was based solely on events which occurred during the testimony of Pezdirtz, an expert witness called by petitioner. Pezdirtz began his testimony early in the proceedings, on January 12, 1966, and, in his initial testimony, stated that he was not employed, his last employer having been the Wood Newspaper Machinery Corporation (1b). Upon further examination, he testified that he had been taken off the Wood payroll as of December 30, 1965, by reason of his appearance in the arbitration proceeding as an expert witness (3b-4b).

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3. The arbitration panel recognized that the collective bargaining agreement, by Section 29, anticipated and provided for the installation of new automated processes in the stereotyping rooms (11a). That section provides that, where the installation of such new automated equipment reduces the number of regular situation holders, "* * * a program of normal attrition will be followed * * *"; that a list of regular situation holders will be prepared and that the employes on that list will be continued in employment but need not be replaced upon termination of employment by reason of death, retirement or voluntary leaving (11a). Thus, by virtue of this provision, there is no loss of presently held jobs involved in this proceeding.

Pezdirtz stated his qualifications which included an earlier employment with the New York distributor of the M. A. N. plate-casting machine, and proceeded to testify at length with respect to the operation of that machine (4b-5b). At the close of the day, the chairman of the arbitration panel stated that Pezdirtz should be given a chance to acquaint himself with the actual operation of the M. A. N. machine installed in respondent's plant and that was arranged (10b). Upon resuming the stand the following morning, Pezdirtz refused to testify further, stating that his refusal was for his "* * * own personal reason" (11b). In the ensuing discussion, counsel for petitioner took the position that subpoenas should issue to Mr. McColley, the president of the Wood Machinery Corporation and to Mr. Peter Romano, an employe of the Wood Machinery Corporation, for the purpose "* * * of inquiring as to whether or not anybody is in contempt of this Committee * * *" (14b). To this, the chairman replied that counsel could apply to the district court for a remedy and that the arbitration panel was limited to the inquiry which had been assigned by order of the district court (14b). After further discussion, the chairman inquired of counsel for petitioner whether he moved "* * * that the witness be held in contempt * * *" to which counsel replied "No, sir" (17b). Counsel for petitioner then moved "* * * that the Committee inquire as part of its function, because this is a question that the Committee ought to resolve, whether its function as a quasi-judicial committee is being frustrated by any outside influence" (17b).

The panel took the matter under advisement and concluded that counsel for petitioner could make an application to the district judge for an order holding Pezdirtz in contempt or an order directing Pezdirtz to resume his testimony (17b). Counsel for petitioner took the position

that Pezdirtz was no longer his witness but was "* * * a witness before this Committee * * *" and that the arbitration panel should investigate the refusal to testify (18b). He insisted that the matter was one for the panel to which the chairman replied that Pezdirtz was petitioner's witness and that counsel for petitioner must decide what he wanted to do (18b).

Counsel for petitioner then requested, and was granted, a recess to permit the parties to apply to the district judge for instructions "* * * as to whether or not this Committee should proceed to inquire into the reasons for Mr. Pezdirtz's refusal to testify * * *" (20b).

Appearing before the district judge in chambers (23b-60b), counsel for petitioner repeated the charge that he had information, which he characterized as "* * * hearsay * * *", as to the reason for the refusal of Pezdirtz to testify (27b). Counsel for petitioner then stated that he wished to make an offer of proof before the district judge to "* * * spread on the record what I have been told is the reason for this sudden turnabout." (29b). After some discussion as to this offer of proof (33b-41b), counsel for petitioner argued that the district court should, at that point, subpoena witnesses to testify with respect to the refusal of Pezdirtz to go on, stressing that he desired to "* * * prove or disprove those charges * * *" and that he desired the opportunity to do so immediately rather than upon review of an adverse award (43b).

The district judge expressed the view that, as a personal matter, he would be relieved if this "* * * matter of innuendo * * *" could be put at rest but, on the precise question before him, took the position that interim interference with the arbitration proceeding was not proper (34b, 42b, 46b-47b, 51b-52b). He concluded that he had no jurisdiction "* * * to intrude upon the arbitration proceedings prior to their completion and a resulting award."

(56b, 58b-59b). He directed the attention of counsel for petitioner to the statutory remedy by way of review and specifically pointed out that, in proceedings to set aside awards, application could be made to the court for taking the depositions of desired witnesses (58b-60b). When the hearing before the arbitration panel was resumed, there was further discussion of the matter and the chairman again stated to counsel for petitioner that the inquiry which the latter demanded was not relevant to the issue before the arbitration panel and that, to support the charges made in an attack upon any award, the testimony of desired witnesses would not be lost, since his deposition could later be taken (81b).

On the following day, January 14, an attorney representing Pezdirtz, who had appeared pursuant to a subpoena, requested an extension of time until January 19, in order that Pezdirtz could confer with him on the problem (81b-83b). During the interval, petitioner obtained permission for two other witnesses to examine the M. A. N. machine and to testify (83b-85b).

On January 19, counsel for Pezdirtz appeared and stated that Pezdirtz, after consultation, was prepared to take the stand "* * * and resume his direct testimony." (85b-86b). Counsel for petitioner insisted on knowing whether Pezdirtz would testify as to the reasons for his prior refusal (86b). The witness took the stand and counsel for petitioner refused to proceed with any direct examination (87b). He insisted that, in the light of the ruling that he could not inquire into the causes of Pezdirtz's earlier refusal to testify, the witness was "* * * a spoiled witness and the quicker he is disposed of the better." (89b). Counsel for petitioner declined to take any position whether Pezdirtz should remain under subpoena, contending that the arbitration panel had issued the subpoena and would have to decide that question (91b-92b).

Further discussion took place between the chairman and counsel for petitioner and the latter reiterated his refusal to continue to question Pezdirtz with respect to the merits of the controversy and again insisted that the witness would have to be excused by the panel since he was no longer the petitioner's witness (93b-94b). Pezdirtz was excused by unanimous vote of the Committee (94b).

C. Proceedings in the District Court.

In support of its motion to vacate the award under Section 10 of the United States Arbitration Act, petitioner filed an affidavit by counsel which charged that Theodore Newhouse, purchasing agent for respondent, had telephoned Peter Romano of the Wood Company on January 12, 1966, and had stated that "* * * the Newhouse chain was finished with Wood * * *" after ascertaining that Pezdirtz was an employe of the Wood Company and had been given leave of absence for the purpose of testifying on behalf of petitioner (62a-63a). Another affidavit to the same effect was filed by a second attorney for petitioner (90a-91a).

In support of its motion to confirm the award (94a), respondent filed affidavits by both Theodore Newhouse and Peter Romano. Both affidavits denied that any threat was made during the course of the conversation between the two men (11a-113a, 114a-116a). The affidavit of Theodore Newhouse made plain that, when Pezdirtz testified that he was not employed, counsel for respondent had requested Newhouse to obtain data about Pezdirtz's employment with the Wood Company for the purpose of obtaining information for cross-examination (112a). Newhouse freely admitted that he was upset about Pezdirtz's testimony before the arbitration panel that he no longer was employed by the Wood Company when the fact was otherwise (111a-112a).

The hearing on the motions to confirm and to vacate took place before the district judge on October 10, 1966. Counsel for petitioner took the position that, on the basis of the affidavits, it could be concluded that the arbitration panel was guilty of misconduct within the meaning of the statute and that the award should be set aside (95b-96b). Near the close of his oral argument in support of the motion to vacate, counsel for petitioner asked the district court "* * * to proceed to have an exhaustive inquiry * * *" in which those accused by petitioner would be placed under oath to determine whether the "* * * arbitration award was born of a fraud * * *" (96b-97b).

On February 6, 1967, the district court issued an opinion and order, confirming the arbitration award. First, the court adverted to the numerous clear authorities which hold that the function of the court, in reviewing arbitration awards, is severely limited, and does not involve an examination of the award for alleged mistakes of law or erroneous evaluation of evidence (153a-155a). The court specifically noted the standards of review set forth in Section 10 of the Arbitration Act. *Supra*, p. 2.

After reviewing in detail the allegations with respect to the charge of witness-tampering, the district court concluded that there was no showing that the arbitration panel was guilty of misconduct in any respect and that there was no other misbehavior by which the rights of the parties had been prejudiced (160a-161a). The judge analyzed in detail the affidavits submitted by the parties and concluded that, even if it were to be assumed that Theodore Newhouse had expressed displeasure upon learning that Pezdirtz was, in fact, an employe of Wood, that expression of displeasure did not justify setting the award aside (160a-161a). The merits of the controversy sent to arbitration did not depend on the attitude of Newhouse toward Wood or the alleged decision of Wood, after learning that

Newhouse was angered, to order Pezdirtz not to testify, and the decision of the arbitration panel not to go into this charge did not, the district judge held, deprive petitioner of a fair hearing.

Finally, the district judge held that petitioner might not now "* * * be heard to complain of the refusal of Pezdirtz to continue testifying since his subsequent offer to do so was rejected by counsel for the Union" (162a).

D. The Decision of the Court Below.

After describing the procedure which preceded the arbitration award, the court below first held that there was "* * * ample evidence * * *" to support the award of the arbitration panel (6A). The opinion then noted that the essential ground upon which petitioner challenged the award was the refusal of the arbitration panel to investigate its claim that respondent had intimidated Pezdirtz (6A).

The court below then set forth the details with respect to the Pezdirtz incident, and the refusal of counsel for petitioner to proceed with the examination of Pezdirtz after the latter had resumed the stand and had stated his willingness to go forward with his testimony (7A-8A).

The court below then turned to consideration of those provisions of the Arbitration Act here involved, namely, Section 10(a) which empowers the district court to vacate an award where "* * * the award was procured by corruption, fraud, or undue means * * *" and Section 10(c) which provides for vacating an award where "* * * the arbitrators were guilty of misconduct in refusing to * * * hear evidence pertinent and material to the controversy; * * *". The court noted that the existence of the stated grounds upon which arbitration awards could be set aside was clearly not intended to destroy the effectiveness of the arbitration process, nor to increase the power of the courts to re-

examine awards (10A). The opinion points out that a contrary holding would defeat the primary purpose of arbitration, a purpose which has been underscored, in connection with labor disputes, by recent decisions of the Supreme Court in the **Warrior** trilogy (10A).

The court next stated that there was no possible question of "corruption, fraud or undue means" under Section 10(a) since the arbitration panel was fully aware of the circumstances with respect to Pezdirtz's testimony and had made a conscious judgment that the panel itself should not undertake an investigation of petitioner's charge (10A-11A). The only remaining question therefore was whether this decision of the arbitration panel could be condemned under Section 10(c) as "misconduct in refusing to hear evidence pertinent and material to the controversy" with resultant prejudice to a party's rights (11A).

The opinion recognized that a literal construction of Section 10(c) might place the court in the position of having to review all rulings by arbitrators excluding evidence, but concluded that the statute could not reasonably be so read (11A). The court remarked in passing that, even in a court case, evidence of an attempt to persuade a witness not to testify was only admissible as the basis of a possible inference that the litigant believed his own case to be weak (an inference which the court stated petitioner had not claimed in this case (12A)), that, moreover, the exclusion of evidence to this effect would not constitute reversible error unless it could be shown that the exclusion was of substantial harm to a party whose witness was approached (11A). The court below went on to point out that, in review of arbitration awards, the court was not intended to "* * * comb the record for technical errors in the receipt or rejection of evidence * * *" (11A). In this case, the court below emphasized, there could be no basis for a holding that the refusal of the panel to conduct an investigation into the

causes of Pezdirtz's refusal to testify was decisive or harmful "* * * in the light of the other evidence in the case" (12A). The opinion then goes on to recount the fact that the hearing continued for more than four weeks after the Pezdirtz incident, that petitioner presented the testimony of two other expert stereotypers and cross-examined experts offered by respondent; and that, during the same four-week period, petitioner had ample opportunity to procure other evidence if it deemed it necessary to do so (12A). Finally, the court emphasized the fundamental fact that counsel for petitioner having refused to examine Pezdirtz when the latter announced his readiness to go forward, he could not now assert as a fact that Pezdirtz would not have testified in petitioner's favor (12A). The court below specifically stated that petitioner "* * * could not by its own conduct make the effort it attributed to the company successful and then protest at the success * * *" (12A). In view of the position petitioner took before the arbitration panel, the court did not feel called upon to discuss the possible courses of action which counsel for petitioner might have followed if in continuing the examination of Pezdirtz, he had been surprised by adverse, instead of favorable testimony from Pezdirtz. In these circumstances, the court below held that it was enough that petitioner was afforded ample opportunity to have the testimony but refused to accept it.

Finally, the court below again emphasized the arbitration proceeding as a whole, noted that the arbitration panel had no general investigatory function, and held that the "* * * vindication of the integrity of the proceedings * * *" which petitioner was calling for had no real effect on the question whether petitioner was accorded a fair hearing on the factual issue as to the one-man operation of the M. A. N. machine, that an award will not be vacated because of an erroneous ruling of arbitrators which does not affect the fairness of the proceeding as a whole (13A).

ARGUMENT.

After an extensive hearing, an arbitration panel resolved the dispute between petitioner and respondent as to the manning of the M. A. N. stereotype plate-casting machine, concluding that one-man operation of the machine had been shown beyond question to be safe and efficient. Both courts below held that the record before the arbitration panel fully supported the award and, in fact, there is no challenge here on that point. Both courts below also gave patient consideration to petitioner's charges that it had been denied a fair hearing and a day in court—the charges now repeated by petitioner before this Court—and found them to be without substance.

We submit that the decisions below are clearly correct and that this case presents no question which warrants review by this Court.

1. *The Proceeding Before the Arbitration Panel.* The incident on which petitioner bases its complaints occurred early in the arbitration proceeding when Pezdirtz, offered by petitioner as an expert, gave what the court below described as "disingenuous" testimony to the effect that he was currently unemployed (9A). When questioning was later resumed on this subject, Pezdirtz qualified his answer, to some extent, by stating that he had recently been released from the payroll of the Wood Newspaper Machinery Corporation because of his coming to give his opinion before the arbitration panel. Wood manufactures a plate-casting machine, sold in competition with the M. A. N. machine, which requires two men for its operation.[4]

4. No further disclosure by petitioner was made as to the nature of its arrangement with Pezdirtz and Wood until long after the arbitration proceeding had closed. The actual nature of that arrangement was shown for the first time in connection with petitioner's motion to vacate the arbitration award, filed on September 12, 1966 (45a).

On the basis of this curious testimony, counsel for respondent requested Theodore Newhouse, purchasing agent for respondent, to inquire of Wood as to the actual status of Pezdirtz, so that the information could be used in cross-examination. *Supra,* p. 10. It is obvious that whatever testimony Pezdirtz gave would have been substantially weakened by a showing that he was, in fact, a salesman for a competing machine which called for a two-man operation.

All this took place on January 12, 1966. On the following morning, Pezdirtz took the stand and refused to testify further for "* * * personal reasons * * *" (11b). At this point, counsel for petitioner called upon the arbitration panel to interrupt its consideration of the merits of the dispute between the parties and conduct a separate inquiry, seemingly in the nature of a quasi-criminal investigation, into the reasons for Pezdirtz's refusal to testify. *Supra,* p. 7. After considerable discussion, the panel ruled that such ancillary investigation was not part of its function, but granted a recess so that the question could be presented to the district judge in chambers.

The district judge properly declined to interrupt the arbitration proceedings before final award. Once a dispute is held to be arbitrable, the "* * * last deliberative action of the court is the appointment of the arbitrators, who thereupon take over the controversy and dispose of it * * *" subject only to "* * * possible disturbance * * *" on a motion to vacate the award. See **Compania Panemena Maritima v. J. E. Hurley Lbr. Co.**, 244 F. 2d 286, 289 (2d Cir. 1957).[5] The district judge went on to point out to

5. See also **Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corporation**, 274 F. 2d 805 (2nd Cir. 1960); **San Martine Compania de Nav. v. Saguenay Term. Ltd.**, 293 F. 2d 796, 800-802 (9th Cir. 1961); **Orion Ship. & Trad. Co. v. Eastern States Petroleum Corp.**, 312 F. 2d 299, 300 (2nd Cir. 1963).

counsel for petitioner that ample opportunity would be available for presenting his charges in connection with any review proceedings, that, at that time, counsel for petitioner could subpoena witnesses, take depositions, and carry out whatever other measures were thought to be necessary to attempt to establish the charges of witness-tampering which, by the admission of counsel for petitioner, were then based on "hearsay". *Supra,* p. 19.

When the parties returned to the arbitration hearing on the same day, the chairman of the panel again emphasized to counsel for petitioner that he had ample opportunity to attempt to substantiate his charges of witness-tampering by calling witnesses in connection with a statutory review proceeding in the event of an unfavorable award.

Even if the matter rested here, no basis for setting aside the award would have been established. As the court below observed (11A), an attempt to suppress evidence, even in a proceeding in court, gives rise, at best, to a possible inference of weakness in the case of the party who attempts the suppression,[6] an inference, however, which petitioner has not claimed in this case. Even had the inference been claimed here, it is clear that it need not be drawn and is not necessarily the basis for reversal in the absence of a demonstration that the suppressed testimony actually damaged the complainant's case. In the context of review of an arbitration award under the "misconduct" language of Section 10(c) of the Arbitration Act, bearing in mind that arbitrators are often laymen and not

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6. The inference is *prima facie* only and does not prevail against proof that the party believes in his own case and that his case is not weak. It was early observed that the inference "* * * does not always follow * * *", **Moriarty v. R. Co.**, L. R. 5 Q. B. 319 (1870) and that it was "* * * not to be pressed too urgently". **Com. v. Webster**, 5 Cush. 295 (1850).

lawyers, the court below properly noted that it was not the function of the reviewing tribunal to "* * * comb the record for technical errors * * *" (11A).[7] Rather, in such circumstance, the reviewing court must determine whether this arbitrator's ruling was so serious as to amount to the deprivation of a fair hearing. Here, on the whole record, the court below held (12A):

> "Even if full play is given to the inference that a party's effort to suppress the testimony of a witness indicates a weakness or lack of merit in his position, it must be recognized that the arbitrators here considered all of the other evidence which was presented to them by both sides on the merits of the issue whether the machine required more than one operator. While the suppression of evidence, if it occurred, may have had evidential value it cannot be said as a matter of law that it was decisive or that its exclusion was seriously harmful in the light of the other evidence in the case."

But, in any event, the matter did not rest at this point. After consultation with an attorney during a recess granted by the arbitration panel for that purpose, Pezdirtz resumed the stand and expressed his willingness to continue with his testimony. *Supra,* p. 9. Counsel for petitioner was adamant in his refusal to question Pezdirtz at all. As the court below suggests without elaboration (12A), a variety of steps were then available to counsel for petitioner. He could have requested a short recess, discussed with Pezdirtz the nature of the testimony which Pezdirtz would give, and decided on that basis whether to go forward. He could

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7. It is well established that arbitrators are not bound by rules of evidence. **Bernhardt v. Polygraphic Co.**, 350 U. S. 198, 205 (1956); **Brotherhood of Railroad Trainmen v. St. Louis Southwestern Ry. Co.**, 252 F. Supp. 961, 962 (D. D. C. 1966).

have questioned Pezdirtz and, in the event of hostile testimony, pleaded surprise and examined Pezdirtz as on cross-examination on the basis of prior conversations with the witness. Counsel for petitioner did none of these things but insisted on treating the incident as closed, reiterating unsubstantiated charges that the witness was "spoiled" and that respondent was guilty of witness-tampering.

Counsel for petitioner argues that the refusal of Pezdirtz to go forward was justified on the ground that proceeding with the witness would have constituted a waiver, on a motion to vacate the award, of the charges of witness-tampering. This argument is plainly without force. If Pezdirtz had continued to give the testimony which petitioner expected, petitioner would have had no ground for complaint. Parenthetically, in that case, Pezdirtz could have been cross-examined as to his employment by the Wood Company. If Pezdirtz had given hostile testimony, no waiver could have occurred since counsel for petitioner could have continued to press the attempt to substantiate its charges on a motion to vacate an adverse award. The fact is that counsel for petitioner was unwilling "* * * to accept or even test * * *" the witness (12A).

In other words, insofar as the arbitration proceeding is concerned, petitioner's sole complaint is that the panel declined to depart from consideration of the merits of the dispute before it, the question which had been referred to it for solution by the district court. Counsel for petitioner had been advised by the district judge in chambers and by the chairman of the arbitration panel as to the appropriate manner in which to preserve, and attempt to prove, the charges of witness-tampering.

There is thus no basis for petitioner's charge that the arbitration panel engaged in an "* * * obstructive prevention * * *" of petitioner's asserted right to inquire, that the arbitrator's rulings created "* * * a series of pit-

falls * * *", or that any action on the part of the arbitration panel "* * * completely foreclosed * * *" petitioner "* * * from having its day in court on the issue of witness-tampering * * *". (Pet., pp. 8, 11, 16). To the contrary, the arbitration panel properly confined itself to the submission, holding the independent investigation which petitioner demanded as not to be within that submission, and confirming the instruction of the district judge that ample opportunity would be afforded to petitioner, on a motion to vacate the award, to support its charges.

2. *The Review Proceeding.* The arbitration award was filed on June 20, 1966. Petitioner's motion to vacate that award was filed on September 12, 1966. The hearing on petitioner's motion to vacate and respondent's motion to affirm the arbitration award took place on September 10, 1966. During this entire interval, petitioner made no effort to obtain a court order, readily available, to take the deposition of Pezdirtz, nor did petitioner request the issuance of subpoenas to Theodore Newhouse or to any officer of the Wood Company. As mentioned above, *supra*, p. 9, petitioner was advised on January 13 by both the district court and the arbitrator of its right to subpoena witnesses, take depositions, and do whatever else it felt was necessary in an attempt to obtain evidence to support this charge of witness-tampering. In fact, as noted by the district court (160a), counsel for petitioner specifically stated that, in an attack upon an unfavorable award, he would probably call Pezdirtz as a witness (92b).

Petitioner's motion to vacate the award was based principally on two affidavits by its attorneys which consisted of a number of excerpts from the testimony before the arbitration panel, and hearsay charges as to the telephone conversation between Newhouse and Peter Romano, a Wood Company officer, on the day when Newhouse was

attempting to ascertain the exact employment status of Pezdirtz. Petitioner's affidavits charged that Newhouse had threatened the Wood Company. Affidavits filed by Newhouse and Romano, the actual parties to the telephone conversations in question, denied this. Newhouse freely admitted that he was disturbed when he discovered the actual nature of the arrangement but he unequivocably swore that he had made no threats. Romano confirmed this statement.

It was on this basis that the matter went to final hearing in the district court with petitioner contending that, on the basis of the affidavits alone, the award should be vacated. Here again, it apparently rejected the suggestion that it could take the deposition of Pezdirtz, Newhouse, Romano, or anyone else it pleased. In the district court's opinion, the district court carefully analyzed the conflicting affidavits, pointing out that they fell far short of substantiating any charge of witness-tampering (25A-26A). The district court observed that the displeasure of Newhouse with the arrangement which Wood had made with petitioner had little to do with the controversy which had been submitted for arbitration and could not be called "* * * corrupt, fraud or undue means * * *" within the meaning of Section 10(a) of the Arbitration Act (26A). It was not until the oral argument on the respective motions to vacate and to affirm the award, that petitioner requested that a further investigation take place, that the district court schedule "* * * an exhaustive inquiry * * *", calling witness to determine whether the "arbitration award was born of a fraud * * *," (96b-97b). As indicated above, petitioner has taken advantage of none of the procedures, *e.g.*, depositions, available to it, prior to oral argument, in support of its motion.

In other words, petitioner, advised as early as January 12, 1966, as to the course to be followed in connection with producing witnesses in support of its charges in any review

proceeding, took no steps, gambled on the sufficiency of its attorneys' affidavits, and, where those were feared to be insufficient, demanded an independent investigation into its charges, this time by the district court on the day of final argument on the motions. In these circumstances, there is no justification for the strong language with which petitioner, before this Court, attacks the district court and the court below. Clearly, petitioner had its day in court and, on that day, took none of the indicated steps to substantiate its charges. There is, accordingly, no substance to petitioner's charge that the district court denied to petitioner "* * * the right to produce evidence * * *" or that the district court denied the "* * * [o]pportunity to present such proof * * *" before reaching final decision (Pet., pp. 16, 17). To the contrary, petitioner was afforded every opportunity of substantiating its charges and consciously failed to avail itself of such opportunity.

Thus, even if this case actually presented some question of constitutional due process, that question would only be reached for decision where the record required such decision. **Peters v. Hobby**, 349 U. S. 331, 339 (1955); **Ashwander v. Tennessee Valley Authority**, 297 U. S. 288, 347 (1935). Similarly, the doctrine of exhaustion of remedies would preclude consideration in this case of petitioner's constitutional claims, in view of the actual facts of record. **Aircraft & Diesel Corp. v. Hirsch**, 331 U. S. 752, 767 (1947); **Bustos-Ovalle v. Landon**, 225 F. 2d 878, 880-881 (9th Cir. 1955); **Olinger v. Partridge**, 196 F. 2d 986, 987 (9th Cir. 1952).

But more to the point, there is no proof whatsoever in this case that respondent was guilty of witness-tampering. For this reason, petitioner's reliance on cases such as **Hazel-Atlas Glass Co. v. Hartford Empire Co.**, 322 U. S. 238 (1944) and **Insurance Company of North America of Philadelphia**

v. Hegewald, 161 Ind. 631, 66 N. E. 902 (1903), is entirely misplaced. Both of those cases involve situations where an actual fraud had occurred and had been proved. In **Hazel-Atlas**, the question was whether a federal court, which had placed major reliance on a fraudulently contrived exhibit, could reopen its judgment after the expiration of the term. In **Hegewald**, it was shown that two members of a three-man appraisal panel were actually partisans of one party to the appraisal, without the knowledge of the other party.[8]

Here, contrary to petitioner's reckless statements, there has never been any showing that respondent in any way attempted to suppress or subvert Pezdirtz as a witness. As a matter of common sense, it is clear that respondent, having prepared its case in full in support of its position in the arbitration dispute, would have vastly preferred the opportunity of cross-examining Pezdirtz on the basis of his employment by Wood.

3. *Petitioner's Reliance on the Warrior Trilogy.* Petitioner never makes clear precisely what it means by the "due process" that it claims. Seemingly a "fair hearing" is not enough since petitioner criticizes the court below for having merely held that a "fair hearing" was accorded (Pet., p. 8). And petitioner cannot be heard seriously to contend that it was not afforded ample opportunity to present evidence in connection with its motion to vacate the award. *Supra,* p. 20. On final analysis, petitioner seems to be contending that the importance of arbitration in labor-management relations requires the courts to assume a more searching role in reviewing arbitration awards (Pet., pp. 8-10). Petitioner argues that, by reason of the decision

8. A similar distinction exists as to **Barr Rubber Products Company v. Sun Rubber Company**, 277 F. Supp. 484 (S. D. N. Y. 1967) and **Singer Sewing Machine Co. v. American Safety Table Co.**, 88 F. Supp. 260 (E. D. Pa. 1949).

below, "• • • the powers of arbitrators have been grossly enlarged and those of the courts to review arbitration proceedings and awards have been emasculated" (Pet., p. 10).

Petitioner's reliance on this Court's decisions in the well-known **Warrior trilogy (United Steelworkers v. American Manufacturing Co.**, 363 U. S. 564 (1960) and **United Steelworkers v. Warrior & Gulf Navigation Co.**, 363 U. S. 574 (1960); **United Steelworkers of America v. Enterprise Wheel and Car Corp.**, 363 U. S. 593 (1960)) is misplaced. There is no need to labor the point. Those decisions emphasize the importance to the national labor policy of limiting court participation in the industrial arbitration process to a minimum. **American Manufacturing** and **Warrior** deal with the threshhold situation where arbitration is sought and resisted. If any of these cases has any relevance at all, **Enterprise**, which deals with court review of an award, is the one closest to the point here. In **Enterprise**, this Court said (363 U. S. at p. 596):

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. • • •"

The presence of statutory standards of review under the Arbitration Act does not in any way vary this relationship between arbitrator and court, as the court below recognized (9A-10A). Decisions under Section 10 of the Act have stressed the "• • • severely limited • • •" role of the court in review. **Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corporation**, 274 F. 2d at p. 808. And see cases cited, *supra*, at p. 16.

This view of the limited function of the court in reviewing an arbitration award, running back to the classic statement by this Court in **Burchell v. Marsh, 17 How. 344,** 349-350 (1854), was the principal basis on which the court below rested its decision. The arbitration panel considered all of the evidence before it and the award contained the "* * * honest decision * * *" of the panel on the dispute submitted. **Burchell v. Marsh,** 17 How. at p. 349. And, even accepting the matters of which petitioner complains for testing purposes, the court below found that there was no showing that the award would have been changed (12A). Summing up, the court below stated (13A):

> "Here the union's contention that the arbitration panel should have held an inquiry or investigation for the general purpose of exposing the misconduct of the company was peripheral to the issue of fact which was before the arbitrators for decision. The panel had no general investigatory function, and the union did not claim the benefit of the inference that the company's position on the issue before the panel was weak or unfounded because of an effort to suppress Pezdirtz's testimony. Whatever might have come from the vindication of the integrity of the proceedings would not affect the question whether the union had a fair hearing on the factual issue whether the M. A. N. machine could be safely and efficiently run with one operator. Even if it touched upon the problem to some extent it is not so substantial or pervasive that the award arrived at by the arbitrators after lengthy hearings and the presentation of substantial evidence by both sides long after the Pezdirtz incident had ended must be cast aside as a quasi-judicial product which is tainted either by fraud or misconduct."

CONCLUSION.

The decisions below are clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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